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**IN THE
COURT OF APPEALS OF INDIANA**

SUBHEN GHOSH,

Appellant-Claimant,

VS.

REVIEW BOARD OF THE INDIANA,

DEPARTMENT OF WORKFORCE

DEVELOPMENT

and

INDIANA DEPARTMENT OF

ENVIRONMENTAL MANAGEMENT,

Appellees-Employer.

APPEAL FROM THE REVIEW BOARD OF THE
DEPARTMENT OF WORKFORCE DEVELOPMENT

The Honorable Steven F. Bier, Chairperson

Cause No. 06-06481

May 11, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Claimant, Subhen Ghosh (Ghosh), appeals the Indiana Unemployment Insurance Review Board's decision that he was not entitled to unemployment insurance benefits.

We affirm.

ISSUE

Ghosh raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the Indiana Unemployment Insurance Review Board erred when it reversed Administrative Law Judge Michael Baker's (the ALJ) finding that Ghosh was entitled to unemployment insurance benefits.

FACTS AND PROCEDURAL HISTORY

On February 2, 2006, Ghosh, a merit employee for the State of Indiana's Department of Environmental Management (IDEM), received a Memorandum notifying him his employment was being terminated. Merit employees must be provided with a written statement delineating the reason for their discharge. IDEM's Memorandum to Ghosh stated, in pertinent part:

A predeprivation meeting was held today, February 2, 2006 at 10:00 a.m. in Human Resources The purpose of the meeting was to consider whether the accusations against you concerning work and ethics issues are accurate.

After investigating the information you supplied to me at the meeting, I do not find any support for your claim.

It is my decision that you violated the State Ethics Policy by choosing to use your company Voyage credit card at the Beech Grove business for which you are a registered agent for Himalaya Mountain, LLC. It is further my decision to suspend you for thirty (30) calendar days, pending dismissal. You are suspended for the period of February 2, 2006 through March 4, 2006 at which time your employment will be terminated.

(Appellant's Appendix p. 3).

On March 9, 2006, the Indiana Department of Workforce Development (Workforce Development) determined Ghosh was eligible for unemployment benefits and issued its Determination of Eligibility. On March 17, 2006, IDEM appealed the Workforce Development's Determination of Eligibility. On June 12, 2006, a hearing was held before the ALJ. On June 14, the ALJ issued the following decision finding, in pertinent part:

FINDINGS OF FACT: On February 2, 2006, [IDEM] discharged [] Ghosh. . . . upon its determination that he "violated the State Ethics Policy by choosing to use your [State of Indiana] Voyage credit card at the Beech Grove business for which you are a registered agent"

IDEM provided [] Ghosh a State vehicle and credit card for the purposes of conducting IDEM business. [] Ghosh used the credit card to purchase gasoline for his State issued vehicle at a convenience store in which he had a proprietary interest. The Indiana State Ethics Commission has not adjudicated that [] Ghosh violated State Ethics Policy.

CONCLUSIONS OF LAW: IDEM discharged [] Ghosh upon its determination that he "violated the State Ethics Policy by choosing to use [his State of Indiana] Voyage credit card at the Beech Grove business for which [he is] a registered agent" The scope of the Administrative Law Judge's inquiry is limited to whether IDEM's discharge of [] Ghosh upon its determination that he violated State Ethics Policy constitutes discharge for just cause in connection with his work so as to disqualify [] Ghosh from receiving unemployment insurance benefits. *Voss v. Review Board Department of Employment Training Services*, 533 N.E.2d 1020, 1021 (Ind. Ct. App. 1989).

IDEM alleged that [] Ghosh violated State Ethics Policy. IDEM must prove that it discharged [] Ghosh for just cause in connection with his work. *Ratkovich v. Review [Bd. of the Ind. Dep't of Employment and Training Servs.]*, 618 N.E.2d 44, 46 (Ind. [Ct.] App. 1993). IDEM must prove that [] Ghosh violated State Ethics Policy.

IDEM is an administrative agency of the State of Indiana. Ind. Code § 13-13-1-1. Ethical standards for the official conduct of employees of Indiana State administrative agencies are set forth in the Indiana Code of Ethics for the Conduct of State Business. 40 Ind. Admin. Code 2-1-3(b). The Indiana State Ethics Commission has exclusive jurisdiction to determine whether conduct constitutes a violation of the Ethics Code. *LTV Steel Company v. Griffin*, 730 N.E.2d 1251, 1258 (Ind. [] 2000).

In *LTV Steel*[], . . . [t]he [c]ourt held []:

“It is clear . . . that the legislature intended the Ethics Commission to have exclusive jurisdiction to establish a code of ethics for the conduct of state business [] and to adjudicate alleged violations thereof [W]hen a [S]tate employee is alleged to have violated an ethics requirement, the allegation is not adjudicated by the appointing authority or state elected official for which or whom the alleged violator is employed but by the Ethics Commission.”

The State Ethics Commission has not adjudicated that [] Ghosh violated the State [Ethics] Code. In light of the [Ethics] Commission’s exclusive jurisdiction, neither IDEM nor a [] Workforce Development Insurance Administrative Law Judge has jurisdiction to establish that [] Ghosh violated the State Ethics Code. In the absence of the [Ethics] Commission adjudication of an Ethics Code violation, IDEM failed to prove that [] Ghosh violated the State Ethics Code, failed to prove that it discharged [] Ghosh for just cause in conjunction with work. If otherwise eligible, [] Ghosh is eligible to receive unemployment insurance benefits.

* * *

DECISION – MODIFIED-APPELLANT: [IDEM] failed to prove that it discharged [Ghosh] for just cause in connection with work.

(Appellant’s App. pp. 6-7) (some internal citations omitted).

On July 6, 2006, IDEM appealed the ALJ's Decision to the Unemployment Insurance Review Board (Review Board). On August 7, 2006, the Review Board reversed the ALJ's Decision determining Ghosh was not eligible to receive unemployment insurance benefits finding, in relevant part:

FINDINGS OF FACT: The Review Board adopts and incorporated the findings of fact of the [ALJ] except to the extent inconsistent with this decision and as modified herein.

[Ghosh] was employed by [IDEM], a Department of the State of Indiana, as a Wastewater Inspector. In connection with the performance of his duties, [Ghosh] was assigned a State vehicle and a Voyager credit card. [Ghosh] worked primarily out of his home in Brownsburg, Indiana. Occasionally he was required to come to [IDEM's] main office in downtown Indianapolis. He was assigned an inspection area consisting of Boone, Parke, Montgomery, Fountain, Warren, Tippecanoe, and Benton [c]ounties.

In January 2006, [IDEM's] Chief Compliance Officer was investigating possible performance deficiencies of [Ghosh]. She discovered irregularities in [Ghosh's] expense records. On May 2-3, 2005, [Ghosh] filed travel vouchers indicating he was in Wabash, Indiana. He claimed a *per diem* for both days and lodging for the night of May 2. He also turned in a receipt for gasoline purchased at a station in Beech Grove, Indiana, at 5:50 PM on May 2.

On May 25-26, 2005, [Ghosh] filed travel vouchers indicating that he was in Lafayette, Indiana. He claimed a *per diem* for both days and lodging for the night of May 25. He also turned in a receipt for gasoline that he purchased at the same gasoline station in Beech Grove, Indiana at 7:12 PM on May 25. [Ghosh] turned in numerous other receipts for gasoline purchased at the Beech Grove station in 2005 and service work performed there.

[Ghosh] obviously could not be in two locations at the same time on May 2 and on May 25, 2005. His explanation for the discrepancy was that he left for Wabash and Lafayette after he purchased gasoline in Beech Grove. Thus, he admitted that he was not entitled to a *per diem* for May 2 and May 25. He was not more than fifty miles from his base on those dates.

Beech Grove, in southern Marion County, is a substantial distance for [Ghosh's] base of operations in Brownsburg, Hendricks County, and from his assigned inspection area. [IDEM] investigated further. The gasoline station had a for sale sign on it. The number to contact on the sign was [Ghosh's] home number. Furthermore, [Ghosh] was the registered agent for the company that operated the station.

When he was confronted with the irregularities described above, [Ghosh] provided [IDEM] with no explanation. At the [ALJ] hearing, [Ghosh] alleged that he did not profit from the sale of gasoline at the Beech Grove station. He contended that he merely provided the merchandise sold at the store portion of the station. He also contended that gasoline was cheaper in Beech Grove.

On February 2, 2006, [IDEM's] Deputy Commissioner suspended [Ghosh] pending termination.

* * *

The [ALJ] found that [IDEM] discharged [Ghosh] without just cause. He based his decision entirely upon his belief that [IDEM] did not have the authority to find [Ghosh] guilty of violating the State's Ethics Policy.

CONCLUSIONS OF LAW: The [ALJ] relied upon *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251 (Ind. 2000). . . . The Indiana [s]upreme [c]ourt ruled that only the State's Ethics Board had jurisdiction to find a violation of the Ethics Code. . . .

The Review Board does not have to determine whether [Ghosh] did or did not violate the Ethics Code. The issue before the Review Board is whether [IDEM] had just cause to discharge [Ghosh]. The fact that a Deputy Commissioner considered [Ghosh's] conduct a violation [of] the Ethics Code is not relevant to the Review Board's determination as to whether [Ghosh's] conduct constituted just cause for discharge. The Ethics Board has jurisdiction to determine if an ethics violation has occurred, but the Review Board is not robbed of jurisdiction to determine if [IDEM] had just cause to discharge [Ghosh]. A Claimant cannot raise a potential Ethics Code violation as a barrier to prevent the Review Board from determining the existence of just cause under Indiana Code § 22-4-15-1. The reasons for [Ghosh's] discharge are apparent from the record. The reasons for [Ghosh's] discharge were discussed with him on two occasions. The Deputy Commission[er], a layman, may have made a legal judgment he was not qualified or empowered to make, but his choice of words does not

change the facts. If the reasons for a discharge are apparent, nothing requires [IDEM] to be legalistically articulate in expressing those reasons.

The Review Board finds that [IDEM] had just cause to discharge [Ghosh]. He claimed *per diems* to which he was clearly not entitled. He drove miles out of his way to purchase gasoline at a station where he admittedly was conducting business. His use of a [S]tate vehicle to go to and from the gasoline station was unauthorized and outside the course of his employment. Furthermore, representing to [IDEM] he was in one city when he was in fact in another was a deliberate act of dishonesty.

(Appellant's App. pp. 1-2).

Ghosh now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Ghosh claims the Review Board improperly reversed the ALJ's determination that he was entitled to unemployment benefits. Specifically, Ghosh argues the Review Board lacks the statutory authority to adjudicate Ghosh's alleged violations of the State's Ethics Code – IDEM's basis for discharging Ghosh. The Review Board contends it does not have to determine whether Ghosh violated the State's Ethics Code as the issue before them was whether IDEM had just cause to discharge Ghosh.

On judicial review of an unemployment compensation proceeding, we determine whether the decision of the Review Board is reasonable in light of its findings. *KLR Inc. v. Ind. Unemployment Ins. Review Bd.*, 858 N.E.2d 115, 117 (Ind. Ct. App. 2006). We are bound by the Review Board's resolution of all factual matters; thus, we neither reweigh evidence nor reassess witness credibility. *Id.* Rather, we consider only the evidence most favorable to the Review Board's decision and the reasonable inferences to be drawn therefrom, and if there is substantial evidence of probative value to support the

Review Board's conclusion, it will not be set aside. *Id.* When, however, an appeal involves a question of law, we are not bound by the agency's interpretation of law, and we will reverse a decision if the Review Board incorrectly interprets a statute.

Ghosh relies on *Voss v. Review Bd. Of the Ind. Dept. of Employment and Training Servs.*, 533 N.E.2d 1020, 1021 (Ind. Ct. App. 1989), for the proposition that the Review Board must rely only upon the same grounds as Ghosh's employer in concluding there was just cause for his discharge. Thus, the issue becomes whether IDEM's stated grounds for discharge have a basis in fact and constitute just cause. *Id.*

Our review of the record indicates that the Review Board did not base its denial of unemployment benefits on Ghosh's alleged violation of the State Ethics Code. Rather, the Review Board determined Ghosh was terminated for just cause by finding: (1) Ghosh claimed *per diems* to which he was not entitled; (2) Ghosh drove miles out of his way to purchase gasoline at a station where he admittedly was conducting business; (3) Ghosh's use of his State vehicle to go to and from the gasoline station was unauthorized and outside the course of his employment; and (4) Ghosh's representations to his employer that he was in one city when he was in fact in another was dishonest. Thus, Ghosh's discharge was based on facts which constitute just case.

Of course, Ghosh is correct that his discharge would have been without just cause had it been based solely on the finding of an Ethics Code violation. *See LTV Steel Co. v. Griffin*, 730 N.E.2d 1251 (Ind. 2000) (holding the State Ethics Commission has exclusive jurisdiction to adjudicate alleged violations of the Ethics Code). Rather, it is apparent IDEM did not discharge Ghosh for an Ethics Code violation. First, IDEM

makes no reference to any specific statutory provision of the Ethics Code. Second, and perhaps more importantly, Ghosh was terminated for using his company Voyager credit card at the Beech Grove business for which he is a registered agent. IDEM's Deputy Commissioner used improper terminology to express its true and proper reasoning for discharging Ghosh. And while IDEM should choose its words more carefully, the facts of this case remain the same.

CONCLUSION

Based on the foregoing, we find the Review Board correctly found that Ghosh was terminated for just cause.

Affirmed.

NAJAM, J., and BARNES, J., concur.